system's headend, or whose city of license is within fifty miles of the cable system's principal headend, is considered "local" for this purpose.[31] Cable systems with more than 36 channels may be required to carry all local noncommercial educational television stations which request carriage.[32] The carriage exemption for stations with a capacity of more than 36 usable activated channels is for a station that substantially duplicates the programming broadcast by another local NCE station requesting carriage.[33] The FCC stated that "substantial duplication" does not occur if at least 50% of the NCE typical weekly programming is distinct from programming on the other NCE station either during prime time or during hours other than prime time. Any cable system operating in a market where no local NCE station is available is required to import one NCE station.

The FCC asks whether the rules in the cable context for carriage of noncommercial TV stations should be applicable to satellite providers and whether the definition of "substantial duplication" should be similar to that used in the cable context. LTVS submits that similar carriage rules should not apply, as satellite providers should be obliged to carry all local NCE stations. In order to pursue its goal of serving the public, the FCC should not limit carriage of NCE stations by satellite providers. The cable rule ties the obligation on cable providers to carry local NCE stations to the number of activated channels the system is using. The

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31 47 U.S.C. § 535(l)(2).

32 47 U.S.C. § 535.

33 47 U.S.C. § 535(e), which also provides that "substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services."

FCC should not limit NCE carriage in this manner. The only limit or exemption on carriage of NCE programs should be for a station that "substantially duplicates" programming. As regards the definition of "substantial duplication," the FCC should define the term so as to further the aim of serving the public interest by providing a wide selection of NCE stations to the subscribers. The definition used in the cable context (providing that 50% of the programming be distinct or else the stations are substantially duplicated) should be the most restrictive definition in the satellite regulations.

E. Channel Positioning

The SHVIA provision on channel positioning and nondiscriminatory pricing is very clear: "the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local market on contiguous channels and provide access to such station's signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu." 47 U.S.C. § 338(d). The FCC asks whether stations carried under retransmission consent must have channels contiguous to channels carried under must-carry; the procedures that can be developed to ensure stations are accessed on nondiscriminatory terms; whether must-carry signals may cost no more per channel than packages of retransmission consent television signals; and lastly, whether electronic program guide information on must-carry channels should be presented in the same fashion as other services provided by the carrier.

In the cable context, the rules require that cable systems transmit must-carry stations on channels selected by broadcasters from the alternatives set forth in the statute.[34] The goal of the cable channel position requirements is to prevent cable operators from undermining the competitiveness of local broadcast stations, and their ability to serve their local communities, by shifting local stations around or "hiding" them in the cable channel map.[35] A similar goal applies to the carriage of local stations by satellite providers. Congress made clear its intent that all subscribers have access to local broadcast signals on contiguous channels. The statute makes no exception from this obligation for stations carried under retransmission agreements, allowing such channels to be non-contiguous to must-carry channels. The FCC should not implement regulations which would serve to make an exemption to a clearly-worded statute. Each local broadcast station must have its signal provided on a designated channel within a range of other broadcast signals transmitted into the DMA.

The FCC also requests comment on the SHVIA provision requiring nondiscriminatory pricing. No satellite provider should discriminate in the prices, terms and conditions of sale or delivery of comparable digital or analog signals among or between competing stations or distributors in the same local market.

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34 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57.

35 *See*, S.Rep. No. 92, 102nd Cong., 2nd Sess. 42, 43-44 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1176-77. The Senate Commerce Committee found "shift[ing] the placement of [local] stations on [cable] systems . . . has the effect of stifling competition. Moreover, it has interfered with the ability of broadcasters to fulfill their statutory obligations to serve their communities. . . . First, . . . repositioning makes it difficult for audiences to locate stations. Second, . . . the higher channel numbers (14 and above) are not viewable on cable-connected sets that are not 'cable-ready.' . . . [C]hannel repositioning has a direct and negative impact on the competitive viability of local broadcast stations and thus the ability to serve the needs of local communities."

The electronic program guide ("EPG") information (displaying programming options) on local signals should be presented in the same fashion as other programming services. If the operator has unfettered discretion in the listings, it can discriminate against local broadcast stations by keeping the local station listings off of the desirable first screen or off of the program guide entirely. The satellite provider should present the local stations in the same manner as it presents other programs on the EPG in order to promote fair competition between satellite-provided programming and local transmission of network stations. The FCC should implement regulations to further this goal of non-discrimination in use of EPGs by the satellite providers.

F. Content to Be Carried.

SHVIA provides that satellite regulations should be implemented comparable to the requirements set forth in 47 U.S.C. §§ 534(b)(3) and 535(g)(1), which contain the cable content regulations.[36] Obviously, the Congressional intent is that regulations on content be similar for both cable and satellite providers. Cable operators are faced with three broad categories of broadcast content they must carry in fulfilling their must-carry obligations. First, cable operators are mandated to carry the primary video, accompanying audio and closed captioning data contained in line 21 of the vertical blanking interval ("VBI") of both qualified local commercial and NCE stations. Second, cable operators are required, to the extent technically feasible, to carry program-related material carried in the VBI or on subcarriers of

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[36] 47 U.S.C. § 338(g).

local commercial stations. Third, with respect to local qualified NCE stations, cable operators, where technically feasible, must carry program-related materials that may be necessary for receipt of programming by handicapped persons or for educational or language purposes.[37] Lastly, cable operators have the discretion to carry any other information in a station's VBI or subcarriers.

The purpose of the rule requiring carriage of the primary video, audio and line 21 closed caption transmissions is to ensure that broadcast signals retain their integrity and that broadcasters are not disadvantaged by transmission of their signal over cable.[38] This should be equally true of satellite transmission. The definition of "primary video" applied to cable operators should also be applied to satellite operators. The satellite provider should be required to carry the entire local signal comprised of primary video and accompanying audio, information contained in line 21 of the VBI, including all scheduled programming, interstitials and commercial advertisements as broadcast in the DMA over the air by the local broadcast stations and distributed via cable by cable distributors. Satellite systems have the capability of retransmitting the VBI and subcarriers of broadcast channels. FCC policies should ensure that satellite operators take into account the obligation to carry all program-related material in developing new systems. The factors used to determine what constitutes program-related material in the cable context should also be used for this analysis in the satellite context.

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[37] 47 C.F.R. § 76.62(e); 47 C.F.R. § 76.606 (closed captioning).

[38] *See, In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6744-45 (1994).

"Technically feasible" should not be defined by the FCC further than as stated, as technical feasibility is constantly changing in today's fast-paced environment and will be affected by the particular characteristics of the equipment used at the local receive facility, the uplink, the satellite, and other points of the facility. The consideration of what is "technically feasible" as applied to the entire local signal composed of primary video and accompanying audio and information contained in line 21 of the VBI, should be similar in both the satellite and cable contexts.

The FCC should require satellite carriage of closed captioning to subscribers. The closed captioning rules apply to all video programming distributors, including multichannel video programming distributors such as direct-to-home satellite services and cable systems and establish a time frame within which all new programming must be provided with captions.[39] The cable regulations specifically require that the operator of the cable TV system deliver intact closed captioning data contained on line 21 of the VBI, as it arrives at the headend or other origination source, to subscriber terminals and in a format that can be recovered and displayed.[40] As there is no reason related to differing technology between cable and satellite for different regulations to apply to each regarding closed captioning, the FCC should enact a rule requiring closed-captioning to be included in all local-into-local broadcast signals.

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39 47 C.F.R. § 76.606.

40 47 C.F.R. § 76.606(b); 47 C.F.R. § 76.62(e).

G. Material Degradation.

SHVIA provides that satellite regulations on signal quality shall be "comparable" to the cable regulations.[41] The cable rule, set forth in 47 U.S.C. § 534(b)(4), states that: "[t]he signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal." The regulation set forth in 47 U.S.C. § 535(g)(2) provides equivalent regulations for noncommercial education television stations. The FCC asks a number of questions about the "material degradation" standard applied to satellite providers, including whether technical standards mirroring cable are warranted or whether new rules should be developed consistent with Congressional direction on compression technology, the definition of "material degradation," the standards and measurement techniques to be used in signal quality disputes, and the kinds of technologies (including spot beaming) a satellite carrier may use to carry local stations.

In the satellite context, "material degradation" should include any instance where a broadcast station freezes, tiles or looks "dirty" due to a satellite carrier's choice of encoding and compression techniques. Due to the difficulty in defining objective criteria for controlling encoding and compression techniques, it is

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41 47 U.S.C. § 338(g).

suggested that subjective criteria be used instead to measure signal degradation. The International Telecommunications Union ("ITU") has issued recommendations for the subjective measurement and evaluation of video.[42] In these recommendations, the ITU defines a five-point quality and impairment scale used to evaluate signals. For example, a rating of four points indicates that the video quality is good and that the impairments are perceptible but not annoying. Tests based upon the ITU subjective criteria are a reflection of what the viewer experiences, not a test of the technology used to deliver the video. This type of measurement standard would comport with Congress' desire that any reasonable type of digital compression be permissible.

LTVS does not believe that the use of certain compression ratios or encoding techniques should be prohibited. Compression ratio is highly variable depending upon the picture content, especially where many channels are statistically multiplexed in one transponder (as is usually the case). Filtering and resolution settings may be used to mask or soften the effects of low bit rates. A satellite carrier has no control over digital techniques used by a broadcast station prior to the carrier's receipt of the signal at the local receive facility. For example, the station's video might have been compressed several times before reaching the satellite carrier's local receive facility and the carrier has no control over this practice. It would thus be impractical to prohibit the use of compression ratios or encoding techniques.

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42 *See*, ITU-R 500-10 ("methodology for the subjective assessment of the quality of television pictures") and ITU-R 1129-2 ("subjective assessment of standard definition digital television (SDTV)

The FCC also requests comments on the kinds of technology a satellite carrier can use to fulfill its carriage requirements, and specifically requests comment on "spot beaming." Spot beams allow the re-use of frequency bands and therefore increase the effective capacity of satellites. This technique is particularly effective when applied to local TV broadcasts. Spot beam technology should be encouraged by the FCC, and satellite carriers should be allowed to designate regional receive facilities.

The purpose of the cable system requirement to transmit television broadcast stations "without material degradation" is to protect the quality of broadcast signals carried on cable systems and to ensure that broadcast stations are able to compete for local viewership on an equal footing with other signals carried on the cable system.[43] No less should be required of satellite carriers.

H. Compensation for Carriage.

47 U.S.C. § 338(e) states that "a satellite carrier shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local television broadcast stations in fulfillment of the requirements of this section or for channel positioning rights provided to such stations under this section. . . ." The FCC asks whether a broadcaster seeking carriage pursuant to a retransmission agreement can negotiate payment terms, as is allowed for cable operators. In must-carry situations in the cable context, the provider cannot receive payment, aside

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systems").

[43] *See*, H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess., at 75 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1257.

from payments as indemnification for any increased copyright liability resulting from carriage of commercial must-carry stations that would be considered distant signals for copyright purposes.[44]

A requirement prohibiting the operator from accepting payment or other consideration in exchange for carriage in must-carry situations, but allowing payment from stations pursuant to retransmission consent agreements, should be adopted for satellite providers, similar to that contained in the cable regulations.[45]

In a local-into-local retransmission consent agreement, the satellite provider and broadcast station can negotiate the terms of carriage of the signal, including specifications on compensation for carriage, commencement of carriage and other terms. The FCC requires fair dealing in negotiating agreements and the parties are required to comply with these regulations.[46] There is no reason why the parties cannot themselves reach agreement on reasonable compensation for carriage of a local broadcast station in a retransmission consent agreement. In must-carry of local broadcast signals, the FCC should mandate that satellite providers cannot charge the local stations for carriage of the signals.

I. Remedies

Pursuant to SHVIA, remedies for violations are divided into two categories: (1) violations related to carriage (i.e., either the program is carried without

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44 17 U.S.C. § 111.

45 Pursuant to 47 C.F.R. § 76.60, a cable operator cannot accept payment for carriage pursuant to must-carry requirements.

46 *See, In re Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order* (2000).

permission or the provider discriminates by failing to carry a program pursuant to must-carry regulations) are remedied exclusively under 17 U.S.C. § 501(A) (with jurisdiction in the courts); (2) violations related to unique carriage violations (i.e., failure of the provider to provide proper channel positioning) are remedied by complaints to the FCC pursuant to 47 U.S.C. § 338 (L)(1). [47]

The FCC seeks comments on several issues related to remedies for violations, including whether it has the venue to remedy non-carriage of signals by carriers. As SHVIA clearly sets forth the jurisdiction of the courts and the Commission, LTVS agrees that the FCC does not have venue to determine disputes related to non-carriage violations.

The FCC also solicits comments on the appropriate remedial action it can order for those disputes falling under the FCC's jurisdiction. If the matter is heard by the courts pursuant to a copyright violation (i.e., carriage without permission), specific forfeiture provisions apply.[48] If a complaint is heard by the FCC for alleged failure to comply with carriage obligations, the FCC should enforce the regulations by similarly ordering payment of forfeiture, if necessary. As pointed out in the *Notice*, cable operators are subject to forfeiture for violations of the cable must-carry rules. As the must-carry rules and regulations will be substantially similar for cable and satellite providers pursuant to Congressional directive, it is reasonable to impose similar forfeiture penalties on non-compliant satellite providers.

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47 47 U.S.C. § 338 (a)(2) and (f)(1).

48 17 U.S.C. § 506.

The FCC also asks whether a broadcaster can file a complaint against a carrier for non-compliance with the content-to-be-carried or material degradation provisions. The FCC jurisdiction clearly extends to such signal quality disputes. 47 U.S.C. § 338(g) provides that regulations for satellite carriers should be comparable to the cable regulations on content-to-be-carried and signal quality. Pursuant to 47 U.S.C. § 338(b)(2), the FCC regulations issued for signal quality pursuant to § 338(g) "shall set forth the obligations necessary" to carry out the "good quality signal" requirement. Thus, the FCC regulations on good quality signal and the content-to-be-carried in the signal are included within Section 338(b)(2) and are issues that may be the subject of complaints to the FCC.

Should a matter arise involving both a unique carriage obligation (i.e., failure of a broadcaster to provide good quality signal) as well as the resulting failure to carry by the satellite provider, the jurisdiction for hearing the violations should be based in accordance with the intent of the Act. The FCC, having jurisdiction over the signal quality issue, and having the necessary expertise and experience in such matters, would first hear the signal quality complaint in accordance with established procedures for hearing such matters. At the conclusion of the FCC proceeding, the remaining complaint of failure to carry could be heard by a court, should such a complaint still exist. For example, should the FCC find that a broadcaster failed to provide a good quality signal to the satellite provider, the case would go to the court with this ruling on signal quality already determined. The only matter to be heard by the court would be failure of the provider to carry a

signal which failed to comply with quality requirements. If jurisdiction is divided in this way, the matters are heard in accordance with the statutory intent.

III. THE COMMISSION SHOULD ADOPT FLEXIBLE MUST-CARRY RULES THAT ENCOURAGE THE TRANSITION TO CARRIAGE OF DIGITAL SIGNALS.

In accordance with FCC rules and regulations and Congressional directive, broadcasters will commence to provide only a digital television service in 2006 or at the point in time in each particular market that 85% of homes within that market are equipped to receive digital TV.[49] Pursuant to a statutory requirement, the Commission initiated a proceeding to establish any changes in the signal carriage requirements of cable TV systems consistent with the Commission initiation of procedures to modify the standards of TV broadcast signals. The FCC notes that 47 U.S.C. § 338(g) provides that regulations on satellite carriers shall be comparable to the requirements on cable operators under 47 U.S.C. § 534(b)(4)(B). In the *Notice*, the Commission solicits comments on the carriage obligations satellite providers should have for a broadcaster's digital signal during the transition period, and specifically requests comments on costs and benefits of a digital must-carry requirement in addition to carriage of the analog signal, how such a requirement would limit the number of markets served, and whether the regulations should be consistent with those for cable.

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[49] *See, Fifth Report and Order, Advanced Television Systems*, 12 FCC Rcd 12809 (1997), *on recon.*, 13 FCC Rcd 7417; *Sixth Report and Order, Advanced Television Systems*, 12 FCC Rcd 14588 (1997), *on recon.*, 13 FCC Rcd 6860 (1998); *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348 (1998).

In accordance with the FCC schedule for transitioning to DTV signals, LTVS suggests a requirement for the must-carry of digital signals by satellite providers tailored to the DTV roll-out in the marketplace. The FCC rules in implementing the DTV signal carriage will require a period beyond 2002 in order for satellite systems to incorporate the carriage of DTV signals with their own capacity increases and/or digital upgrades. While cable systems have been engaged in extensive rebuilding for the digital environment, present satellites have a limited capacity to accommodate additional signals. The greater bandwidth necessary to carry the full digital signal of a television station on a satellite correspondingly reduces the number of analog channels that can be carried by the satellite. In order to overcome these capacity limits on satellites, additional satellites will need to be launched to accommodate all DTV signals. As it takes a considerable amount of time (approximately three years) to construct a satellite, it will be several years before satellites can be constructed and launched to carry all the local DTV signals.

In order to pursue public DTV acceptance and provide the full service of local stations, satellite providers will need to convey the full 19.4 megabit digital signal. The full 19.4 megabit signal serves the public more effectively and is both dynamic and adaptable, allowing the station to simultaneously provide programming and coverage of local events of interest. Using the full 19.4 signal, a subscriber can view both a regularly scheduled broadcast show and any secondary coverage of breaking local news or emergency weather warnings. For example, an announcer can briefly interrupt regularly scheduled programming to advise viewers of local emergency

weather warnings and the DTV channel where the breaking news story will continue to be carried. A viewer can then elect whether to continue to view the regular programming or to tune to another channel to learn more about the warnings affecting the local area. This ability to present options to the viewer is vital, especially in the event of local emergencies. In addition to simultaneous broadcasts, the local station can use the 19.4 signal to send further information on the emergency warnings (for example, pertaining to the viewer's specific location) via a data stream to the viewer's personal home computer. Without carriage of the full 19.4 signal, such creative use of DTV is proscribed and the public is likely to become disenfranchised with high definition television, making the return of the analog spectrum impractical.

Satellites will probably be first launched to accommodate DTV in the larger markets, since larger markets had the earliest required date to commence DTV service and hence DTV is likely to face consumer acceptance first. While it is not clear that all satellite providers, even for the large markets, will launch new satellites at the same pace, a broad time frame should be established in considering reasonable digital must-carry rules. Even though it will take some time to construct and launch additional satellites, the immediate carriage of digital signals (particularly in large markets with a large percentage of the population) is necessary to speed the acceptance of DTV by the public. The FCC needs to enact regulations for local-into-local transmission that will comply with the digital rules and transition deadlines so as to help to achieve this end goal of digital signals, and

at the same time enact regulations which will allow satellite systems to add the necessary capacity over the next several years to accommodate DTV signals.

A. Interim DTV Carriage Until Transition From Analog to Digital Technology.

DTV signals will be required of all commercial television stations by May 1, 2002.[50] LTVS suggests that, as the new satellites come into operation and prior to the point in time that a broadcast station returns its analog station (i.e., 2006 or whenever 85% of households in the market are DTV-ready), the local broadcast station should elect which signal it wants to have carried via satellite – either the standard or digital signal. During this transition to DTV, satellite systems should be required to carry whichever signal the station elects: either the analog signal or the full 19.4 megabit digital signal of local broadcast stations.[51] The satellite provider can then convey the selected signal to the subscriber. The DBS provider does not carry the station's analog signal, but instead carries the terrestrial analog signal in digital form. A DBS provider can convert a broadcast station's analog signal to digital for retransmission, which is subsequently reconverted to an analog signal by the DBS box at the television set. Accordingly, if a broadcaster is not prepared to convey signals in the full 19.4 digital signal, a DBS provider can carry that station's analog signal, up-convert the analog signal for a digital satellite, and then provide the signal in either mode (analog or digital) depending upon the type

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50 47 C.F.R. § 73.624(d).

51 In order to pursue public DTV acceptance and provide the full service of local stations, satellite providers, particularly in providing service to the larger markets, will need to convey the full 19.4 megabit digital signal.

of television set the subscriber owns. This technology differs from cable, which requires dual analog/digital streams. Of course, if the station elects to have the digital signal carried, the provider should convey the signal in the full 19.4 megabits and in accordance with the rules enacted by the FCC in this proceeding regarding material degradation, content-to-be-carried, etc. The satellite systems should have an obligation to provide broadcast DTV offerings (if the station so requests) consistent with the providers' other DTV programming channels, so that consumers have a full array of competitive services available to them.

In some markets, the local broadcast stations and public may be DTV-ready prior to other markets. Therefore, in some markets the satellite carrier will provide 19.4 megabit digital signals, while providing analog signals in those markets not yet ready to transition to DTV. The local stations should have the ability to gauge when the particular market it serves is DTV-ready, at which time the satellite carrier should be required to commence DTV signal carriage. The LTVS proposal illustrates one way to adapt the must-carry principle to the circumstances of the particular market, while ensuring that consumers have access to DTV signals through their satellite systems as quickly as possible. This phased-in transition to digital carriage also ensures that the satellite providers have sufficient spectrum and time to build the necessary satellite capacity to carry the full 19.4 megabit digital signal to all stations in the DMAs served by the provider.

In order to fulfill this transitional implementation to digital carriage, LTVS suggests that, at the onset, DBS providers be required to carry the full 19.4 megabit

digital signals of stations in the top 30 markets where DTV broadcasting was required to commence in November 1999. However, such DTV carriage would not be required prior to January 1, 2004 which grants to the providers the necessary time to prepare for this carriage requirement. For all other DMAs, satellite carriage of local-into-local transmission of the digital signal can commence at the termination of the analog television broadcast signal for that particular DMA, subject to prior notification to the satellite carrier 120 days in advance of the change date.

As stated previously, satellites (unlike cable) have limits on capacity. In effect, the satellite providers will be able to carry only a limited number of digital or analog signals until the time that additional satellites are launched and capacity increased. The transitional schedule proposed by LTVS gives the satellite providers the time necessary to construct and launch these additional satellites. During the transition to digital technology, the satellite carrier should be required to carry only the analog or digital signal at the station's election. However, the FCC should enact rules now for mandatory DTV carriage in the future due to the time required to construct and launch the necessary satellites. When considering the facts that the length of time to construct a satellite is approximately three years, that the life of a satellite is twelve to fifteen years, and that, once launched, it is difficult to modify or make adjustments to a satellite, the FCC should proceed to implement rules for both a transition to digital carriage and eventual mandatory digital carriage that will take effect over the next ten to twenty years.

B. Effect of Dual Carriage Rule.

A dual carriage rule would severely limit the number of markets served if no additional satellites were placed into service because the greater bandwidth of digital results in the lesser number of analog channels that can be carried. In those markets where stations request carriage of the digital signal, the digital signal should be carried at the full 19.4 megabits so that the full advantage of digital broadcasting can be provided to the public.

C. Costs of Digital Carriage.

The *Notice* inquires as to the costs for satellite providers in carrying DTV signals. These costs will vary depending upon the technical choices systems make, business choices, and the extent to which providers and manufacturers cooperate in arriving at technical standards that facilitate the transmission of digital cable and broadcast signals. The costs are thus difficult to estimate at this time. To facilitate the carriage of local television stations, a common satellite platform could be used to reduce the number of orbital slots and frequencies required and thus provide efficient use of limited spectrum. Additionally, it would be the most economical way of proceeding and enhance the opportunity for local-into-local transmission in the smaller markets.

CONCLUSION

LTVS asks that the FCC enact regulations implementing the carriage provision of SHVIA in accordance with its suggestions contained herein.

Respectfully submitted,

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